No. 448

In the Supreme Court of the United States

October Term, 1955

United States of America, appellant

v.

McKesson and Robbins, Inc.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the district court denying appellant's motion for summary judgment (R. 16) is reported at 122 F. Supp. 333. The opinion of the district court dismissing the complaint (R. 180) is as yet unreported.

JURISDICTION

The final judgment of the district court was entered on June 6, 1955 (R. 183). Notice of appeal was filed in that court on August 5, 1955 (R. 250). This Court noted probable jurisdiction on December 12, 1955 (R. 251). The jurisdiction of this Court is conferred by Section 2 of the

Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869.

QUESTION PRESENTED

The Miller-Tydings and McGuire Acts exempt certain so-called "fair trade" agreements from the prohibitions of the antitrust laws. By express provision, however, the exemption does not extend to agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other." The question presented by this appeal is whether the exemption applies to "fair trade" agreements between a manufacturer and independent wholesalers where the manufacturer itself sells at wholesale in competition with the independent wholesalers.

STATUTES INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended by the Act of August 17, 1937, 50 Stat. 693, commonly known as the Miller-Tydings Act, 15 U. S. C. 1, provides in part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or

container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor * * *.

Section 5 (a) of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of July 14, 1952, 66 Stat. 632, commonly known as the McGuire Act, 15 U. S. C. 45 (a), provides in part as follows:

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

* * * * *

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of

this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

STATEMENT

INTRODUCTION

This is a civil action under Section 4 of the Sherman Act charging McKesson & Robbins ("McKesson") with violation of Section 1 of the Act and seeking appropriate injunctive relief. The alleged violations involved certain of McKesson's "fair trade" contracts.

The complaint (R. 1) was filed on May 27, 1952. On July 1, 1954, the district court denied the Government's motion for summary judgment (R. 16). At the trial (R. 163–180), held on May 18, 1955, no testimony was taken; the case was submitted solely on depositions, exhibits, stipulations, and other documentary evidence. Thereafter, on June 6, 1955, the district court ordered the complaint dismissed (R. 183). The present appeal is from that decision.

THE DISTRIBUTION OF MC KESSON BRAND PRODUCTS

McKesson, a Maryland corporation with its home office in New York City (R. 17), is the largest drug wholesaler in the United States (R. 141). Operating through 74 wholesale divisions

located in 35 states (R. 17, 36), McKesson sells drug store merchandise of various brands to retailers, principally drug stores, substantially throughout the nation (R. 17, 147). For the fiscal year ended March 31, 1954, the sales of all drug products by McKesson's wholesale divisions amounted to approximately $338,000,000 (R. 140–141).

McKesson is also a manufacturer of a line of drug products, hereinafter referred to as "McKesson brand products" (R. 17). For the fiscal year ended March 31, 1954, total sales of McKesson brand products amounted to approximately $11,000,000 (R. 66). McKesson's manufacturing operation is conducted through a single manufacturing division located at Bridgeport, Connecticut (R. 17). This division, like each of McKesson's 74 wholesale divisions, has a separate headquarters and a separate staff of employees (R. 7, 72). None of the 75 divisions, however, is separately incorporated (R. 18, 38, 54, 70). All are component parts of the same corporation and are responsible to the corporation's president and board of directors (R. 70, 71).

To the extent permissible under state law, McKesson requires the retailers of McKesson brand products to sell such products at "fair trade" retail prices fixed by McKesson (R. 6, 181). These prices are set forth in published schedules of wholesale and retail prices (opposite R. 37 and opposite R. 199). McKesson distributes its own

brand products to retailers through two channels: (1) directly to retailers; and (2) through independent wholesalers (R. 17–18). The pertinent facts concerning each of these two channels of distribution may be briefly summarized.

(1) DIRECT SALES TO RETAILERS

The major portion of McKesson brand products is distributed through McKesson's own wholesale divisions. For such merchandise, the wholesale division receiving the shipment makes "payment" to the manufacturing division "by check" sent to McKesson's home office (R. 54, 103–105). The wholesale division in turn sells the merchandise to retailers at wholesale prices specified in McKesson's published price schedules.[1]

McKesson also makes direct sales of McKesson brand products through its manufacturing division. These sales are made to a group of retailers—mostly drug store chains—who are considered "desirable accounts" (R. 77, 201). For the fiscal year ended June 30, 1952, the aggregate sales of McKesson brand products by the manufacturing division to retailers amounted to $1,352,521 (R. 201, 60).

(2) SALES THROUGH INDEPENDENT WHOLESALERS

In addition to making direct sales to retailers, McKesson distributes its own brand products

[1] As pointed out in the text *infra*, McKesson's wholesale divisions also make substantial sales of McKesson brand products to independent wholesalers.

through independent wholesalers. McKesson's sales to independent wholesalers are made primarily through its manufacturing division (R. 37). These sales are made under "fair trade" contracts requiring the wholesalers, in reselling the products, to adhere to the prices fixed by McKesson. For the fiscal year ended June 30, 1952, such sales were made to 21 independent wholesalers and amounted to $763,767 (R. 30). Sixteen of the 21 are engaged in competition with McKesson's wholesale divisions,[2] and the remaining five are in competition with McKesson's manufacturing division.[3]

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[2] See McKesson's "Admission of facts" (R. 61) and "Stipulation of facts" (R. 61–63).

Ten of the 16 serve trading areas which are substantially identical or materially overlapping with these of McKesson's wholesale divisions (R. 30–31, 37). Sales by the manufacturing division to these ten wholesalers amounted to $283,462 for the year ended June 30, 1952 (R. 30–31, 37).

The other six serve trading areas also overlapping (but less materially) with those of McKesson's wholesale divisions (R. 61–63). These six are as follows: (1) Kiefer-Stewart Drug Co., Indianapolis, Ind.; (2) Charles Leich and Co., Evansville, Ind.; (3) Pennsylvania Wholesale Drug Co., Wilkes-Barre, Pa.; (4) Smith, Kline and French, Philadelphia, Pa.; (5) Kauffman-Lattimer Co., Columbus, Ohio; (6) Owens and Minor Drug Co., Richmond, Va. Sales by the manufacturing division to these six wholesalers amounted to $265,810 for the year ended June 30, 1952 (R. 37).

[3] The remaining five wholesalers are as follows: (1) District Wholesale Drug Co., Washington, D. C.; (2) H. B. Gilpin Co., with branches at Washington, Baltimore, and Norfolk; (3) M. Brenner and Son, Harrisburg, Pa.; (4) Krull Wholesale Drug Co., Philadelphia, Pa.; (5) Shoemaker and Busch, Philadelphia, Pa. (R. 37). Sales by the

McKesson also makes sales of McKesson brand products to independent wholesalers through its wholesale divisions. For the fiscal year ended June 30, 1952, such sales amounted to approximately $200,000 (R. 56–57, 209–210). On June 6, 1951, shortly after this Court's decision in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, the wholesale divisions were advised by the company's vice-president in charge of drug merchandising that "none of our wholesale divisions will sell any McKesson labeled products to any wholesaler who has not entered into a fair trade contract with McKesson Laboratories" (R. 50). To carry out that policy, each wholesale division was requested to send the manufacturing

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manufacturing division to these five wholesalers amounted to $214,495 for the year ended June 30, 1952 (R. 37).

The manufacturing division competes with each of the five (among others) by selling direct to chain drug stores located in the wholesalers' trading areas (R. 201, 60). For example, the manufacturing division solicits and makes direct sales of McKesson brand products to Peoples Drug Stores, which has its home office and a number of stores in Washington, D. C., where District Wholesale Drug Co. and H. B. Gilpin Co. have their home offices (R. 90, 202–205). As another example, the manufacturing division solicits and makes direct sales to Sun Ray Drug Co., which has its home office and a number of stores in Philadelphia, where Krull Wholesale Drug Co. and Shoemaker and Busch have their home offices (R. 90, 234–238). It is customary, in fact, for such retailers to purchase some McKesson brand products from local wholesalers (either McKesson wholesale divisions or independent wholesalers) as well as from the manufacturing division (R. 143, 144, 145, 203, 210, 222, 224, 228, 231, 232, 234–235, 239, 243, 246).

division a list of independent wholesalers to whom the wholesale division sold McKesson brand products (R. 50). In response, the names of 127 independent wholesalers were submitted; and of this number, 73 entered into "fair trade" agreements with McKesson (R. 56, 58–60). Each of the 73 is in competition with the McKesson wholesale division from which it makes its purchases (R. 148, 150–151).

McKesson's price schedules (opposite R. 37 and opposite R. 199) specify a wholesale list price for each McKesson brand product and also provide for certain discounts "off list" varying in size with the size of the retailer's purchase.[4] During the fiscal year in question (the year ended June 30, 1952), and in fact until March 21, 1955, the maximum discount allowed under the schedules was "10% and 5% off list" for purchases over $250 (R. 129, 209, 181). This limitation, on the other hand, was not applicable to sales by McKesson's manufacturing division directly to large retailers, and such retailers during the same period received a discount of 20% off list on every

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[4] The *manufacturer's* price—the price at which the manufacturing division sells McKesson brand products to independent wholesalers—is determined by deduction of a flat discount of 25% from the specified wholesale list price (R. 200, 131). With respect to purchases from McKesson wholesale divisions, independent wholesalers pay the specified wholesale list price less 16⅔% (R. 200, 131).

order of $1,000 or more (R. 84, 209).[5] On March 21, 1955, after the taking of depositions in the instant case, McKesson issued a new schedule providing that McKesson's fair trade wholesale prices do not apply on orders of $1,000 or more (R. 129, 209). Prior to that date, independent wholesalers handling McKesson brand products were not authorized under their fair trade contracts with McKesson to grant discounts larger than "10% and 5% off list" (R. 84, 106–107).

DISTRICT COURT PROCEEDINGS

The Government's complaint (R. 1) charged that McKesson's "fair trade" contracts with the independent wholesalers constituted illegal price-fixing in violation of Section 1 of the Sherman Act. McKesson's answer (R. 5) admitted the use of such contracts, but claimed that they were exempted from the Sherman Act by the Miller-Tydings and McGuire Acts.

The Government moved for summary judgment (R. 11) on the ground that these Acts, which expressly exclude contracts "between wholesalers" or "between persons, firms, or corporations in competition with each other," do not immunize the challenged agreements. The district court, Judge Murphy sitting, denied the motion (R. 16).

[5] Despite this difference in discounts, some independent wholesalers and some McKesson wholesale divisions filled single orders from retailers for McKesson brand products amounting to $1,000 or more, although such instances have been rare (R. 64, 181).

Although the court recognized that the legislative history of the Miller-Tydings and McGuire Acts was inconclusive (R. 20–21) and that "direct price-fixing" is illegal *per se* under the Sherman Act (R. 22), it was "unwilling, at this stage of case law development of legislatively sanctioned resale price fixing" (R. 21), to apply the *per se* rule "in fair trade situations absent a factual showing of illegality" (R. 22). Such a showing, moreover, could not be made "simply by pointing to *some* restraint of competition * * *" (R. 22–23, emphasis added); the court noted that "every fair trade agreement made by a producer who acts in no other capacity necessarily restrains competition." (R. 23.) The "true test of legality" of "fair trade" agreements between a "producer-wholesaler of dual capacity" and independent wholesalers, the court held, "is whether some *additional* restraint destructive of competition is occasioned" (R. 23, emphasis added).

The case then proceeded to trial before Judge Clancy (R. 163–180). The Government, pursuant to Judge Murphy's opinion, sought to prove an "additional restraint" on the competition between McKesson and the independent wholesalers by evidence of McKesson's special discounts to certain large drug chains (R. 174–175). After the trial, Judge Clancy ordered the complaint dismissed (R. 180). He "concur[red] in and adopt[ed]" Judge Murphy's "ruling that fair trade price fixing by a producer-wholesaler was

not *per se* illegal under the Sherman Act" (R. 182) and held that the Government's evidence did not establish an "additional restraint" within the meaning of the test enunciated by Judge Murphy (R. 183).[6]

SUMMARY OF ARGUMENT

In the Miller-Tydings and McGuire Acts, Congress exempted certain resale price maintenance agreements from the prohibitions of the antitrust laws. Both Acts expressly provide, however, that the exemption shall not apply to price-fixing agreements "between wholesalers" and "between persons, firms, or corporations in competition with each other." These provisos "continue * * * the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level."

[6] In conjunction with his opinion, Judge Clancy made six findings of fact, dealing generally with McKesson's distribution practices (R. 180–181). Thereafter the Government moved the court to make additional findings to "clarify the Record for the purposes of the plaintiff's appeal" (R. 184). After argument, Judge Clancy denied the motion from the bench, stating that "Rule 52 (b) does not warrant any judge's making a finding after the entry of judgment, unless for the purpose of changing the original decision" (R. 199). Judge Clancy added that he had "examined, by the way, the proposed new findings" and that he "thoroughly disagree[d] with the plaintiff that many of them are supported by the evidence" (R. 199).

Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U. S. 384, 389.

McKesson is not only a manufacturer but is also a wholesaler. The instant suit challenges resale price maintenance agreements between McKesson and 94 independent wholesalers with whom McKesson competes in the sale of McKesson brand products. It is the Government's position that these agreements are unmistakably agreements "between wholesalers" and/or "between persons, firms, or corporations in competition with each other" and hence cannot be deemed exempt under the Miller-Tydings and McGuire Acts.

I

A. In the absence of a special exemption, price-fixing agreements in or affecting interstate commerce have long been condemned by this Court under the Sherman Act. Moreover, because of the inherent effect of such agreements on competition, the "rule of reason" applicable to certain other forms of restraint has been rejected in this area. In short, such agreements are illegal *per se.* No principle is more firmly established in the law of antitrust. *United States* v. *Trenton Potteries,* 273 U. S. 392; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150.

Since the 1911 decision in *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, this principle has frequently been applied to price-fixing agreements—so-called resale price maintenance

agreements—between a manufacturer and its dealers. *E. g., United States* v. *Masonite Corp.*, 316 U. S. 265; cf. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384. All such agreements in or affecting interstate commerce, this Court has made clear, are illegal *per se*, "except as the seller moves along the route which is marked by the Miller-Tydings Act" (*United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 721) and the subsequent McGuire Act. See also *United States* v. *Univis Lens Co.*, 316 U. S. 241, 252.

Against this background, the decision below can only be understood as a direct challenge to the *per se* doctrine and as an attempt to rekindle a controversy long settled by this Court. The district court concluded that "such threshold *per se* doctrine for direct price fixing hardly supports a similar one in fair trade situations absent a factual showing of illegality" (R. 22). According to the court, moreover, such a showing could not be made "simply by pointing to *some* restraint of competition" (R. 22–23, emphasis added). The "true test of legality," the court stated, is "whether some *additional* restraint destructive of competition is occasioned" (R. 23, emphasis added). Thus the court, while paying lip service to the *per se* doctrine, in fact rejected it "in fair trade situations" and replaced it with the court's own conception of an appropriate "rule of reason."

In reaching its decision, the court did not even purport to rely on any language in the Miller-Tydings and McGuire Acts or their legislative history. Instead, after pointing out the economic evils of resale price maintenance, the court relied on the fact that "the legislature has weighed these possible disadvantages against the balance of evils attending price-juggling on branded merchandise" (R. 22) and decided in favor of legalizing resale price maintenance. But, as this Court's decisions demonstrate, there is no basis for supposing that Congress, in enacting the Miller-Tydings and McGuire Acts, intended any change in the traditional *per se* doctrine. The exemption obviously did not immunize *all* resale price maintenance agreements. The question in each case is whether the challenged agreement is inside or outside the exemption. If the agreement is found to be inside the exemption, the agreement is legal by any standard. On the other hand, if the agreement is found to be outside the exemption, there is no reason to judge the legality of the agreement by any more lenient standard than any other non-exempt price-fixing agreement. Either the agreement is exempt or not exempt. No reason has been advanced for judicially creating a third category of agreements which are outside the exemption but which should nevertheless be spared from application of the *per se* doctrine.

B. To establish the illegality of the challenged agreements, therefore, no showing of "additional restraint" or "factual showing of illegality" need be made. Unless exempt under the Miller-Tydings and McGuire Acts, the agreements are illegal *per se*.

Application of the *per se* doctrine in the instant case is particularly appropriate.. For the challenged agreements not only eliminate competition among the independent wholesalers (as do all "fair trade" agreements between a manufacturer and independent wholesalers) but, in addition, *eliminate competition between McKesson and the independent wholesalers.* In selling McKesson brand products to retailers, each of the 94 independent wholesalers is in competition with either a McKesson wholesale division or McKesson's manufacturing division.

II

A. Once it is determined that the challenged agreements are illegal *per se* unless exempt, the only question remaining is whether the agreements are entitled to the protection of the Miller-Tydings and McGuire Acts. A proviso in each Act, as already noted, denies protection to agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other."

If these terms are taken "in their normal and customary meaning," *Schwegmann Bros. v. Cal-*

vert Distillers Corp., 341 U. S. 384, 388, it would be indisputable that the challenged agreements are within the scope of the provisos and hence not exempt. With respect to the "between wholesalers" phrase, both parties to each of the challenged agreements—McKesson and one of the independent wholesalers—operate wholesale firms that distribute McKesson brand products to retailers. McKesson, in fact, is the largest drug wholesaler in the country. Similarly, McKesson and the independent wholesalers are "persons, firms, or corporations in competition with each other." All 94 of the independent wholesalers are engaged in competition with either a McKesson wholesale division or McKesson's manufacturing division.

Interpreting these provisos according to their ordinary meaning is especially appropriate in view of this Court's mandate to limit antitrust exemptions "strictly to the terms of the statutory grant." *United States* v. *Univis Lens Co.*, 316 U. S. 241, 251; *United States* v. *Masonite Corp.*, 316 U. S. 265, 280.

B. Congress, moreover, could reasonably have determined to withhold the benefits of the "fair trade" exemption in this area. The construction urged here avoids the evil of "horizontal" agreements—the elimination of competition between the parties. This evil, not present in the ordinary "fair trade" agreement, is present in especially objectionable form in a "fair trade" agree-

ment between a manufacturer-wholesaler and a competing independent wholesaler; for the manufacturer-wholesaler, because of its leverage as a manufacturer of a line of trade-marked products, is thus able to dictate its competitors' prices on these products. Cf. *United States* v. *Masonite Corp.*, 316 U. S. 265, involving a remarkably similar price-fixing arrangement.

The potentialities of abuse through such agreements are well illustrated by the instant case. McKesson's agreements with the independent wholesalers accomplished two purposes. First, the agreements prevented the independent wholesalers from underselling McKesson's wholesale divisions. Second, the agreements enabled McKesson's manufacturing division to undersell the independent wholesalers in dealing with the large "desirable accounts." Such use of "fair trade," we believe, is consistent with neither the language nor the aim of the Miller-Tydings and McGuire Acts.

Other economic dangers inhere in agreements of this type. If a manufacturer's own wholesale outlets are inefficient, he may seek to meet the problem by setting his "fair trade" price higher than otherwise. And independent wholesalers may be influenced to handle the products of a manufacturer which has its own wholesale outlets merely because of the added advantage of minimizing competition with those outlets. See *United States* v. *Masonite Corp.*, *supra*.

C. McKesson, however, takes the position that the provisos have no application to "fair trade" agreements—that is, agreements between a producer or distributor, on the one hand, and their customers, on the other. According to McKesson, because of the seller-buyer relationship involved in such agreements, the parties to "fair trade" agreements can never be "in competition with each other at the same functional level." More specifically, McKesson contends that its seller-buyer relationship with the independent wholesalers renders the provisos inapplicable to the 94 challenged agreements.

But this emphasis on the seller-buyer relationship between the parties completely ignores the competitive relationship also existing between the same parties. McKesson's manufacturing and wholesaling operations are conducted by a single corporation administered by a single president and controlled by a single board of directors. For purposes of bookkeeping or internal administration, a corporation can sub-divide itself into as many component divisions as it wishes. It cannot, however, escape civil or criminal liability by the simple device of treating such divisions as independent entities. For the acts of any one of the divisions, the corporation is responsible.

Thus, when McKesson's manufacturing division entered into the 94 agreements challenged here, it did so on behalf of the corporation—not just the manufacturing division. And the corpora-

tion, primarily through its wholesale divisions and to some extent through its manufacturing division itself, competes with the independent wholesalers "on the same functional level"—*i. e.*, in selling McKesson brand products at wholesale to retailers. McKesson's relationship with the independent wholesalers, therefore, is not simply one of seller-buyer but also one of competitor *vis-a-vis* competitor. Unless the substance of the challenged agreements is to be subordinated to the form in which McKesson has cast them, this competitive relationship precludes any exemption for the agreements under the Miller-Tydings and McGuire Acts.

D. The legislative history of the Miller-Tydings and McGuire Acts affords no justification for the construction urged by McKesson. The committee reports, as the district court noted (R. 21), "are replete with condemnation of 'horizontal' and approbation of 'vertical' fair trade arrangements" and do not "come to grips with the instant problem, squarely and unequivocally." The same is true of statements by individual legislators who either introduced the bills or served on committees that had considered the provision in question. With respect to statements by other individual legislators—*e .g.*, Senator Humphrey during the Senate debate on the McGuire Act—at best they are inconclusive. While the Humphrey statement may appear to

support McKesson's construction, it is hardly sufficient in itself to override the unambiguous language of the provisos, especially in view of the many expressions of opposition, during the House and Senate debates, to "horizontal" price-fixing between competitors.

E. McKesson urges that the Government's construction of the provisos would substantially destroy the "fair trade" exemption. Such fears, to say the least, are considerably exaggerated. The only price-fixing agreements in controversy are those between McKesson and the independent wholesalers. And cancellation of these agreements will not relieve retailers of any obligation they may have under state "fair trade" laws to adhere to McKesson's retail price schedule. Moreover, the only manufacturers that would be affected by a decision invalidating such agreements are those who distribute their products both through their own selling organization and through independent outlets, and even then only to the extent that the manufacturer's own selling organization is *in competition* with the independent outlets.

ARGUMENT

The issue before the Court is a narrow one. No constitutional problems are involved; the matter is purely one of statutory interpretation. Compare *Schwegmann Bros.* v. *Calvert Distillers*

Corp., 341 U. S. 384. The issue may be stated simply as follows: whether a manufacturer like McKesson, which distributes its products both through its own selling organization and through independent wholesalers engaged in competition with its own selling organization, can legally fix the resale prices of the competing independent wholesalers. More specifically, the case relates solely to the legality of 94 price-fixing agreements, each between McKesson on the one hand and an independent wholesaler on the other.

In the Miller-Tydings Act of 1937, Congress exempted certain price-fixing agreements from the prohibitions of the antitrust laws. The Act expressly provided, however, that the exemption shall not apply to price-fixing agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other." In reference to this proviso, this Court in *Schwegmann, supra,* noted "that the Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level." 341 U. S. at 389. In 1952, after the *Schwegmann* decision, which held that the Miller-Tydings Act did not validate "non-signer" provisions of state "fair trade" laws, Congress enacted the McGuire Act for the purpose of validating such provisions, and thus broadened the

scope of the "fair trade" exemption.[7] In precisely the same language as the Miller-Tydings Act, however, the McGuire Act expressly provides that the exemption shall not apply to price-fixing agreements "between wholesalers" or "between persons, firms, or corporations in competition with each other."

Notwithstanding these provisos in the Miller-Tydings and McGuire Acts, the court below sustained the legality of McKesson's price-fixing agreements with the independent wholesalers (R. 16). On the ground that the "*per se* doctrine for direct price fixing hardly supports a similar one in fair trade situations absent a factual showing of illegality" (R. 22), the court held that such contracts are valid unless they impose some "additional restraint" on competition over and above their ordinary price-fixing effect (R. 23).

It is the Government's position that McKesson's price-fixing agreements with independent wholesalers are illegal *per se* without regard to any "additional restraint." This position is set forth below in terms of two basic propositions: (1) that the agreements are illegal *per se* unless exempt under the Miller-Tydings and McGuire Acts; (2) that the agreements are not exempt un-

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[7] Whereas the Miller-Tydings Act was enacted as an amendment to the Sherman Act, the McGuire Act was enacted as an amendment to the Federal Trade Commission Act. As a consequence, the narrower Miller-Tydings Act remains in force.

der the Miller-Tydings and McGuire Acts. The first relates to the Government's burden of proof; the second relates to McKesson's defense based on the claimed exemption.

I. McKesson's Price-Fixing Agreements With Independent Wholesalers Are Illegal *per se* Unless Exempt Under the Miller-Tydings and McGuire Acts

A. THE DISTRICT COURT ERRED IN HOLDING THE PER SE DOCTRINE INAPPLICABLE

In the Sherman Act, Congress decreed that "competition not combination, should be the law of trade." *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, 465; *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 493. Completely at war with this policy, as this Court has recognized, is the device of the price-fixing agreement; for "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *United States* v. *Trenton Potteries,* 273 U. S. 392, 397; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 221. Accordingly, since the very inception of the Sherman Act, such schemes have repeatedly been condemned by this Court. *E. g.: United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290; *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 408; *United States* v. *Trenton Potteries, supra; Ethyl Gasoline Corp.* v.

United States, 309 U. S. 436, 458; *United States* v. *Socony-Vacuum Oil Co.*, *supra*; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 252-253; *United States* v. *Masonite Corp.*, 316 U. S. 265, 274; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 720; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 296; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 143; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211, 213; *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 386; *United States* v. *New Wrinkle, Inc.*, 342 U. S. 371, 377.

These decisions, moreover, establish the principle that the illegality of price-fixing agreements does not depend on a showing of the unreasonableness of the particular practice. Because of the inherent effect of such agreements on competition, the "rule of reason" applicable to certain other forms of restraint has been rejected in this area; price-fixing agreements have been conclusively presumed to be unreasonable.[8] In determining the legality of any given price-fixing agreement, it has been deemed immaterial whether prices are raised, lowered, or maintained at existing levels (*Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211, 213); whether the prices set are fair or unfair (*United States* v.

[8] This was recognized in the very decision first articulating the "rule of reason" in Sherman Act cases. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 65.

Trenton Potteries, 273 U. S. 392, 397); whether the agreement fixes minimum, maximum, or specific prices (*Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U. S. 211, 213; *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384, 386); whether the price-fixing is accomplished by express contract or by more subtle means (*United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 222–223); whether the participants possess market control (*id.* at 221); whether the amount of commerce affected is large or small (*id.* at 225, n. 59); whether the motives of the participants are good or evil (*id.* at 222); whether the agreement will prove beneficial in curbing competitive "abuses" (*id.* at 218; *United States* v. *Masonite Corp.,* 316 U. S. 265, 276); or whether the effect of the combination may be to increase or decrease the distribution of the price-fixed article (*ibid.*). As this Court has said: "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. * * * [T]he Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 221–222. In short, absent a special exemption by Congress, price-fixing agreements in or affecting interstate commerce are not only illegal but are illegal *per se*. No

principle is more firmly established in the law of antitrust.[9]

Since the 1911 decision in *Dr. Miles Medical Co.* v. *Park & Sons Co., supra*, this principle has frequently been applied to price-fixing agreements—so-called resale price maintenance agreements—between a manufacturer and its dealers. *E. g.: Ethyl Gasoline Corp.* v. *United States, supra; United States* v. *Univis Lens Co., supra; United States* v. *Masonite Corp., supra; United States* v. *Bausch & Lomb Co., supra*, Cf. *Schwegmann Bros.* v. *Calvert Distillers Corp., supra.*[10] By means of such agreements, the manufacturer seeks to control the price at which the dealers may resell the manufacturer's product. Such a manufacturer "can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other." *Dr. Miles Medical Co.* v. *Park &*

[9] In *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, this Court declared that "for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act. * * *" Subsequent decisions have re-affirmed this principle. *E. g., Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211, 213.

[10] See also *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85, 99–100; *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U. S. 208; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 452–453; *Old Dearborn Distributing Co.* v. *Seagram Corp.*, 299 U. S. 183, 188.

Sons, 220 U. S. 373, 408. The *per se* doctrine applies even as against attempts by a patentee to fix resale prices on the patented article. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 457–458; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 252; *United States* v. *Masonite Corp.*, 316 U. S. 265, 282. The doctrine thus cover the entire field of resale price maintenance agreements in or affecting interstate commerce "except as the seller moves along the route which is marked by the Miller-Tydings Act" (*United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 721) and the subsequent McGuire Act. See also *United States* v. *Univis Lens Co.*, 316 U. S. 241, 252; *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 296.

Against this background, the decision below can only be understood as a direct challenge to the *per se* doctrine and as an attempt to rekindle a controversy long settled by this Court. Judge Murphy's opinion acknowledges the economic "mischief" of resale price maintenance agreements (R. 22):

> Price competition on a single brand of merchandise is eliminated and not necessarily that occasioned by unrestrained price cutting and "loss leader" selling. Price reductions made possible by low cost store management, inventory control, or low-rent store location are not possible on such fair-traded items. A cushioned margin of profit may help inefficient distribu-

> tors in the field and stifle the initiative of ones who would seek to increase their volume by price reductions based on economies.

The opinion also acknowledges that "direct price-fixing has been condemned as unlawful and an unreasonable restraint of trade without regard to the reasonableness of the prices fixed and irrespective of whether prices were actually raised or lowered" (R. 22). The court nevertheless refused to apply this rule in the instant case. The court concluded that "such threshold *per se* doctrine for direct price fixing hardly supports a similar one in fair trade situations absent a factual showing of illegality" (R. 22). Such a showing, it was stated, could not be made "simply by pointing to *some* restraint of competition" (R. 22–23, emphasis added).[11] In the court's view, the "true test of legality" is "whether some *additional* restraint destructive of competition is occasioned"

[11] For this proposition, the court cited *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238. But the *Board of Trade* case did not involve an agreement, as here, designed to fix a market price and eliminate competition; rather, "[t]he restriction was upon the period of price-making." 246 U. S. 231, 239. In issue was an exchange rule prohibiting members from purchasing or offering to purchase certain grains, from the closing of the session until its opening the next day, at a price other than the closing bid. The narrow scope of the *Board of Trade* decision was pointed out in *United States* v. *Trenton Potteries*, 273 U. S. 392, 401, and *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 217.

(R. 23, emphasis added). This test might be met, the court indicated by way of illustration, if it could be shown that a producer-wholesaler entered into resale price maintenance agreements with independent wholesalers "as a first step toward and with intent to gouge consumers" (R. 23). The court warned, however, that "[n]o inflexible standard should be laid down to govern in advance" (R. 23).

Thus the court, while paying lip service to the *per se* doctrine, in fact rejected it "in fair trade situations" and replaced it with the court's own conception of an appropriate "rule of reason." It is a contradiction in terms to say, as the court did, that the *per se* doctrine is inapplicable "absent a factual showing of illegality." The whole import of the *per se* doctrine is that no such "factual showing of illegality" (a term repeated four times in the court's opinion, R. 22–24) need be made. Moreover, the test which the court adopted in lieu of the *per se* doctrine will, in all probability, be impossible to satisfy in most cases. For proof that the agreements occasion "some *additional* restraint destructive of competition"—*e. g.*, proof that they were made "as a first step toward and with intent to gouge consumers"—will as a practical matter be ordinarily unavailable. The result is not far different from an outright grant of immunity to such agreements.

In reaching this decision, the district court did not even purport to rely on any language in the

Miller-Tydings or McGuire Acts. Nor did it rely on the legislative history of the two statutes; Judge Murphy found the legislative history of the two statutes to be " 'unedifying and unilluminating' " (R. 20).[12] Instead, after pointing out the economic evils of resale price maintenance, the court relied on the fact that "the legislature has weighed these possible disadvantages against the balance of evils attending price-juggling on branded merchandise" (R. 22) and decided in favor of legalizing resale price maintenance. "[I]n the light of such legislative appraisal and approbation" (R. 22), the court concluded that the *per se* doctrine was inappropriate here and that only a showing of restraint over and above the ordinary effect of price-fixing agreements would suffice (R. 23). This conclusion, we submit, is erroneous.

There is no basis for supposing that Congress, in enacting the Miller-Tydings and McGuire Acts, intended any change in the traditional *per se* doctrine. The exemption certainly did not immunize all resale price maintenance agreements. Only particular types of such agreements were immunized and then only under specified conditions. Moreover, these conditions are more stringent than comparable conditions in state "fair

[12] Quoting from Mr. Justice Jackson's concurring opinion in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 397.

trade" legislation.[13] "We start then with a federal act which does not * * * turn over to the states the handling of the whole problem of resale price maintenance on this type of commodity. What is granted is a limited immunity * * *." *Schwegmann Bros v. Calvert Distillers Corp.*, 341 U. S. 384, 388. The question in each case is whether the challenged aggeement is inside or outside the exemption. If the agreement is found to be inside the exemption, the agreement is legal by any standard. On the other hand, if the agreement is found to be outside the exemption, there is no reason to judge the legality of the agreement by any more lenient standard than any other non-exempt price-fixing agreement. The question in each case thus calls for a "yes" or "no" answer. Either the agreement is exempt or not exempt. No reason has been advanced for judicially creating a third category of agreements which are outside the exemption but which should nevertheless be spared from application of the *per se* doctrine. By hypothesis Congress has not included such agreements within the scope of its legislative largesse.

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[13] For example, the provisos to the Miller-Tydings and McGuire Acts deny an exemption to "persons, firms, or corporations in competition with each other." This clause is not present in the provisos of any of the state "fair trade" acts, which generally exclude only "any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices." Report of the Federal Trade Commission on *Resale Price Maintenance* (1945), pp. 80–81.

The decisions of this Court support this analysis. On at least four occasions since enactment of the Miller-Tydings Act, this Court has struck down resale price maintenance agreements as illegal *per se*. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 252–253; *United States* v. *Masonite Corp.*, 316 U. S. 265, 274; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 720. And in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 386, although consensual agreements were not directly involved, the resale price maintenance scheme there under review was held to be unprotected by the Miller-Tydings Act and hence illegal *per se*. In none of these cases was the "legislative appraisal and approbation" of some types of resale price maintenance allowed to affect in any way the application of the *per se* test to other restraints in the same general field. Similarly, in connection with other exemptions, the "legislative appraisal and approbation" of some protection for patentees did not deter this Court from applying the *per se* test to resale price maintenance agreements purportedly based on patents. Such a scheme "derives no support from the patent and must stand on the same footing under the Sherman Act as like stipulations with respect to unpatented commodities" (*Univis*, p. 251) and is "subject to the general law" (*Masonite*, p. 277). See also *Ethyl Gasoline Corp.* v. *United States*, *supra*.

B. APPLICATION OF THE PER SE DOCTRINE WOULD REQUIRE CONDEMNATION OF THE CHALLENGED AGREEMENTS

Unless exempt, McKesson's agreements with the independent wholesalers must likewise stand "on the same footing under the Sherman Act" as any other non-exempt price-fixing agreement and are likewise "subject to the general law." Otherwise stated, unless this Court should find that they come within the specific terms of the statutory exemption (discussed in Point II) conferred by the Miller-Tydings and McGuire Acts, the agreements are illegal *per se*.[14]

From the standpoint of the Sherman Act, as already indicated, the vice of ordinary resale price maintenance agreements (agreements between the manufacturer of a branded product, on the one hand, and his dealers, on the other) is that they curb competition among the dealers. See *Dr. Miles* case, *supra*, 220 U. S. at 408. Here, of course, the contracts go further (a factor of crucial importance, as we indicate in Point II, for purposes of determining whether they can qualify under the exemption provisions involved). The 94 challenged agreements not only eliminate competition among the independent wholesalers *but also eliminate competition between McKesson and the independent wholesalers*. Seventy-three of the independent wholesalers compete with McKesson wholesale divi-

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[14] It is not controverted (see R. 6) that the agreements and the commerce to which they relate are interstate in character.

sions *located in the same communities* as the 73 independent wholesalers.[15] Ten of the other independent wholesalers compete with McKesson wholesale divisions whose trading areas are substantially identical, or materially overlapping, with those of the ten independent wholesalers.[16] An additional six independent wholesalers compete with McKesson wholesale divisions whose trading areas also overlap, but less materially, those of the six independent wholesalers.[17] And many of the independent wholesalers—including the five not otherwise in competition with McKesson—serve trading areas in which there are located large retailers who make direct purchases from McKesson's manufacturing division.[18]

The substantial nature of the competition involved is even more apparent when considered

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[15] These agreements relate to sales to independent wholesalers by McKesson wholesale divisions. See Statement, *supra*, pp. 9–10. The other 21 agreements relate to sales to independent wholesalers by McKesson's manufacturing division.

[16] For the year ended June 30, 1952, sales by the manufacturing division to these independent wholesalers amounted to $283,462. See Statement, *supra*, p. 7.

[17] For the year ended June 30, 1952, sales by the manufacturing division to these independent wholesalers amounted to $265,810. See Statement, *supra*, p. 8, n. 2.

[18] For the year ended June 30, 1952, sales by the manufacturing division to these five wholesalers amounted to $214,495. During the same period, sales by the manufacturing division to large retailers amounted to $1,352,521. It is customary for such retailers to purchase some McKesson brand products from local wholesalers (either McKesson wholesale divisions or independent wholesalers) as well as from the manufacturing division. See Statement, *supra*, pp. 8–9, n. 3.

in terms of the total amount of goods in competition. For this purpose, the amount of McKesson brand products sold by independent wholesalers in competition with McKesson (*supra*) reveals the scope of only one side of the competition. To this amount must be added the amount of McKesson brand products sold by McKesson in competition with the independent wholesalers. For example, the trading areas of ten independent wholesalers who compete with McKesson are substantially identical, or materially overlapping, with the trading areas of seven of McKesson's wholesale divisions (R. 61). For the year ended June 30, 1952, McKesson's sales to these independent wholesalers amounted to $283,462 (R. 31). During the same period, the seven wholesale divisions involved made sales of McKesson brand products in the amount of $786,309 (R. 31). Thus, in these few trading areas alone, the total amount of goods in competition was approximately a million dollars. This amount represents "an appreciable amount of commerce under any standard" (*United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225–226) and "cannot be said to be insignificant or insubstantial" (*International Salt Co.* v. *United States*, 332 U. S. 392, 395, 396). Particularly is this so in a price-fixing case, since "Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of commerce

involved * * *." *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 173; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, n. 59.

II. McKesson's Agreements With the Independent Wholesalers Are Not Exempt Under the Miller-Tydings and McGuire Acts

A. The agreements are "between wholesalers" and "between persons, firms, or corporations in competition with each other" in the plain and ordinary sense of those terms

In defense of the validity of its agreements with the independent wholesalers, McKesson relies on the Miller-Tydings and McGuire Acts. Like the Miller-Tydings Act (pp. 2–3, *supra*) on which it is patterned, paragraph (2) of the McGuire Act (pp. 4–5, *supra*) exempts certain types of resale price maintenance agreements relating to certain types of trade-marked commodities. We may assume, for the sake of discussion, that paragraph (2), without more, would immunize the challenged agreements. Paragraph (5), however, provides:

> (5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, *between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or*

> *between retailers, or between persons, firms, or corporations in competition with each other.* [Emphasis added.]

The italicized language is derived from an almost identical proviso in the Miller-Tydings Act, which provides that the exemption—

> shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, *between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.* [Emphasis added.]

This proviso, as this Court has stated, "expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level." *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 389; *United States* v. *Masonite Corp.*, 316 U. S. 265, 279, n. 4. It is the Government's position that the challenged agreements cannot be held exempt under the Miller-Tydings and McGuire Acts for the reason that they are resale price-fixing agreements "between wholesalers" and/or "between persons, firms, or corporations in competition with each other."

If these terms are taken "in their normal and customary meaning," *Schwegmann Bros.* v. *Cal-*

vert Corp., 341 U. S. 384, 388, it seems plain that the 94 challenged agreements are within the scope of the provisos and hence not exempt. With respect to the "between wholesalers" phrase, it is conceded that the parties to each of the 94 challenged agreements—McKesson and the respective independent wholesalers—operate wholesale firms that distribute McKesson brand products to retailers. McKesson, in fact, is the largest drug wholesaler in the country. Similarly, McKesson and the independent wholesalers are "persons, firms, or corporations in competition with each other." As shown in the preceding section, all but five of the 94 independent wholesalers are engaged in competition with McKesson's wholesale divisions, and the remaining five are in competition with McKesson's manufacturing division. Even assuming *arguendo* that any question existed as to the applicability of the "between wholesalers" phrase because of McKesson's role as a manufacturer as well as a wholesaler, no such objection can be raised against the "corporations in competition" phrase. It would be difficult, indeed, to select words more descriptive of the 94 agreements.

Interpreting the provisos according to their ordinary meaning is especially appropriate in view of this Court's mandate to limit antitrust exemptions "strictly to the terms of the statutory grant." *United States* v. *Univis Lens Co.*, 316

U. S. 241, 251; *United States* v. *Masonite Corp.*, 316 U. S. 265, 280. And see *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 388, 390. If the policy were otherwise, the general law of competition as expressed in the Sherman Act might be emasculated by a proliferation of "implied" exemptions. And where a strict construction of an antitrust exemption results in an interpretation that accords with the common usage of the language, a defendant seeking a broader interpretation has a doubly heavy burden—one which can be sustained only by showing, beyond doubt, that Congress must have had a contrary purpose.

B. APPLICATION OF THE MILLER-TYDINGS AND MC GUIRE ACTS IN STRICT ACCORDANCE WITH THEIR TERMS AVOIDS ECONOMIC DANGERS WHICH CONGRESS COULD REASONABLY APPREHEND

There are, moreover, good reasons for withholding the benefits of the "fair trade" exemption in this area. It is one thing to exempt, for example, resale price maintenance agreements between independent wholesalers and a manufacturer that distributes its trade-marked product exclusively through independent wholesalers; the parties to such an agreement do not operate on the same functional level and hence the agreement does not relieve the manufacturer of any competition. But it is quite another thing to exempt resale price maintenance agreements between independent wholesalers and a manufacturer-whole-

saler that distributes its trade-marked product partly through its own wholesale outlets in competition with the independent wholesalers; the parties to such an agreement do in fact operate on the same functional level and hence the effect of the agreement is to eliminate competition *between the parties.* It is this factor—not present, as already noted, in the ordinary "fair trade" agreement—that makes so-called "horizontal" agreements invalid. The vice is present in particularly objectionable form in a "fair trade" agreement between a manufacturer-wholesaler and a competing independent wholesaler; for the manufacturer-wholesaler, because of its leverage as a manufacturer of a line of trade-marked products, is thus able *to dictate its competitor's prices* on these products.

The potentialities of abuse through such agreements are well illustrated by the instant case. McKesson's agreements with the independent wholesalers require the latter, in selling McKesson brand products, to abide by the McKesson wholesale price schedule in force. The schedule specifies a "list" price and also various discounts "off list" ranging in size according to the amount of the retailer's purchase. Prior to March 21, 1955, the maximum discount authorized by the schedule then in force was "10% and 5% off list," regardless of the amount of the retailer's pur-

chase.[19] An independent wholesaler could not grant a larger discount without breaching his agreement with McKesson. This limitation, however, did not apply to direct sales by McKesson's manufacturing division to large retailers considered "desirable accounts" (mostly drug chains such as, *e. g.*, Walgreen's and People's). These retailers received a flat discount of 20% off list on every purchase of $1,000 or more from the manufacturing division.[20]

Thus, McKesson's agreements with the independent wholesalers accomplished two purposes. First of all, the agreements served to prevent the independent wholesalers from underselling McKesson's own wholesale divisions. Price competition was destroyed, not only among the independent wholesalers but also with McKesson itself. Secondly, the agreements enabled McKesson's manufacturing division to undersell the independent wholesalers in dealing with the large "desirable accounts." By forbidding the inde-

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[19] This maximum discount applied on orders of $250 or more. On March 21, 1955, after the taking of depositions, McKesson issued a new schedule providing that McKesson's fair trade wholesale prices do not apply on orders of $1,000 or more (R. 209).

[20] Despite the difference in maximum discounts available, some independent wholesalers and some McKesson wholesale divisions have filled single orders from retailers for McKesson brand products amounting to $1,000 or more, although such instances have been rare (R. 64).

pendent wholesalers to grant discounts larger than 10% and 5% at the same time it was granting a flat 20% discount, McKesson effectively reserved for itself the business of the "desirable accounts." The anomalous result is that "fair trade," ostensibly designed to aid the manufacturer by protecting his good will, has been used by McKesson to enhance its competitive position *as a wholesaler.* And to the extent that "fair trade" is designed to aid the small retailer, this purpose certainly has not been advanced by McKesson's grant of an extra 5% discount to selected large drug chains. Such use of "fair trade," we believe, is consistent with neither the language nor the aims of the Miller-Tydings and McGuire Acts.

Other economic dangers inhere in the use of "fair trade" agreements by an "integrated" manufacturer (a manufacturer operating its own wholesale or retail outlets). Under a "fair trade" pricing system, a "non-integrated" manufacturer generally sets its resale prices at a level geared to the marketing costs of the independent resale outlet of average efficiency. But an "integrated" manufacturer is likely to fix resale prices primarily in relation to its own outlets, and if these are inefficient the price thus fixed will tend to be higher than if the manufacturer were not also distributing its own products. See Note, 64 Yale L. J. 426, 431.

In addition, the very existence of the price-fix on McKesson products may induce a competing independent wholesaler to handle McKesson brand products rather than purchase similar products from a "non-integrated" manufacturer with whom McKesson is in competition. The value of McKesson brand products to such a wholesaler may be enhanced because of the elimination of competition between the wholesaler and McKesson's wholesale divisions. No such advantage accrues to the independent wholesaler by buying from a "non-integrated" manufacturer. See Note, 50 Nw. U. L. Rev. 78, 86–87.[21]

The danger of such "preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition * * *" was pointed out by this Court, in a strikingly similar context, in *United States* v. *Masonite Corp.*, 316 U. S. 265, 281–282. Masonite, a manufacturer of

[21] Judge Murphy, in his opinion below (R. 23–24), appears to have recognized these dangers, but held that the Government must make a "factual showing" that the evil actually exists in the particular case. For the reasons stated in the first portion of this brief, and as this Court has repeatedly emphasized, no such "factual showing" is necessary in price-fixing cases; for price-fixing, unless exempt, is illegal *per se*. *E. g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150. We discuss the economic evils which may flow from "fair trade" agreements between vendors and their competitor-vendees, not to prove "additional restraint" in this case, but to emphasize that the consequences dictated by the language which Congress used are by no means capricious.

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a patented hardboard used in the building trade, executed *del credere* "agency agreements" for the sale of its product. The "agents" agreed to abide by the resale prices specified by Masonite. Both "principal" and "agents" maintained selling organizations and, to a large extent, competed in the same markets. Some of the "agents" also manufactured their own brand of hardboard, but, in striking down the scheme, the Court did not differentiate between the "agents" who were only distributors and the "agents" who were manufacturers as well as distributors. Instead, the Court based its decision squarely on the ground that Masonite was fixing the resale prices charged by its competitors. The Court declared (pp. 279–280):

> when it is clear, as it is in this case, that the marketing systems utilized by means of the *del credere* agency agreements are those of competitors of the patentee, and that the purpose is to fix prices at which the competitors may market the product, the device is, without more, an enlargement of the limited patent privilege and a violation of the Sherman Act. In such a case the patentee exhausts his limited privilege when he disposes of the product to the *del credere* agent. He then has, so far as the Sherman Act is concerned, no greater rights to price maintenance than the owner of an unpatented commodity would have. [citing the *Dr. Miles* decision, *supra*]

In the footnote referred to in the last sentence of the quotation, the Court rather plainly implies that the Miller-Tydings Act, because of its proviso, would likewise fail to confer immunity upon a price-fixing agreement between the "principal" and a competing "agent."[22]

In any event, even apart from the footnote, the *Masonite* decision is persuasive here. In each case, the price-fixing scheme centered on a manufacturer that distributed its products partly through its own selling organization and partly through other distributors. In each case, the manufacturer competed in the same market with the independent distributors. In each case, by means of a series of agreements, the manufacturer fixed the prices at which the independent distributors could resell the product.[23] While it

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[22] The footnote reads as follows:

"It should be noted in this connection that the Miller-Tydings Act (50 Stat. 693) which amended § 1 of the Sherman Act so as to legalize certain types of resale price agreements expressly excluded 'any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other'."

[23] In each case, also, there existed a seller-buyer relationship between the parties to the agreements. Note McKesson's contention (discussed in the next section of this brief) that the provisos to the Miller-Tydings and McGuire Act have no application to price-fixing agreements between parties having such a relationship.

is true that the manufacturer in *Masonite* sought to uphold its agreements on the basis of patents, whereas McKesson relies on the "fair trade" exemption, the economic evil is precisely the same. And it was on this ground that the agreements in *Masonite* were held invalid. 316 U. S., at 281–282. As this Court concluded (p. 282): "The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se*." See also *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 401.

C. THE EXISTENCE OF A SELLER-BUYER RELATIONSHIP BETWEEN MC KESSON AND THE INDEPENDENT WHOLESALERS IS NOT CONTROLLING SO LONG AS THERE IS ALSO A COMPETITIVE RELATIONSHIP BETWEEN THEM

McKesson agrees, of course, that the provisos "continue * * * the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level." *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 389. Nevertheless, McKesson takes the position that the provisos are completely inapplicable to "fair trade" agreements—that is, agreements between a producer or distributor, on the one hand, and their customers, on the other (Motion to Affirm, p. 4). According to McKesson, the parties to "fair trade" agreements, because of the very nature of the agreements, can never be persons "in competition with each other at the same functional level." [24]

[24] McKesson, in fact, contends that the provisos are aimed solely at agreements "fixing the prices at which *two or more*

The fallacy of this argument is McKesson's unfounded assumption that the two types of agreements—(1) agreements between persons "in competition with each other at the same functional level" and (2) "fair trade" agreements—are mutually exclusive. Stated otherwise, McKesson erroneously assumes that, since it stands in a seller-buyer relationship with the independent wholesalers, it cannot also be in competition with them at the same functional level. As the instant case demonstrates, however, the two categories are overlapping, not distinct.

McKesson makes much of the claim that each of its agreements with the independent whole-

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competitive products are to be sold" (Motion to Affirm, p. 6). This contention was not accepted by the court below, which recognized that the provisos might apply to "fair trade" agreements under some circumstances. The contention, moreover, was expressly rejected by the Federal Trade Commission in *Eastman Kodak Co.*, CCH Trade Reg. Rep., par. 25,291. The Commission stated (p. 35,420) that "We believe Congress also intended to prohibit horizontal price fixing agreements between parties at the same functional level with reference to the *same* trade-marked commodity."

And see *United States* v. *Masonite Corp.*, 316 U. S. 265, 279-280, where this Court, in a resale price-fixing case involving a single product, indicated the applicability of the Miller-Tydings proviso. This proviso, it should be noted, is worded in the singular; it refers to price-fixing agreements "on *any commodity* referred to in paragraph (2) * * *." [Emphasis added.] See also Senator Humphrey's remarks, 98 Cong. Rec. 8870, stating that the proviso in the McGuire Act applies to an agreement "between wholesalers" on a single product.

salers "faces downward between a manufacturer and a distributor acting in the relationship of producer and reseller of brand merchandise." (Motion to Affirm, p. 5.) But this emphasis on the seller-buyer relationship between the parties completely ignores the competitive relationship also existing between the same parties. McKesson operates at two levels; it not only manufactures its own brand products but also distributes them through its own wholesale divisions. Both operations—manufacturing and wholesaling—are conducted by a single corporation administered by a single president and controlled by a single board of directors.[25] For purposes of bookkeeping or internal administration, a corporation can sub-divide itself into as many component divisions as it wishes. It cannot, however, escape civil or criminal liability by the simple device of treating such divisions as independent entities. For the acts of any one of the divisions, the corporation is responsible.[26]

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[25] We do not mean to suggest, of course, that a different result would follow merely if McKesson had organized its divisions as separate subsidiary corporations. But here McKesson has not even taken that step.

[26] Much the same objection can be made to the decision of the Federal Trade Commission in *Eastman Kodak Co.*, CCH Trade Reg. Rep., par. 25,291. The Commission, relying in part on Judge Murphy's opinion in the instant case, upheld the validity of "fair trade" agreements between a manufacturer with its own retail stores, on the one hand, and independent retailers engaged in competition with the manu-

More specifically, when McKesson's manufacturing division entered into the 94 agreements challenged here, it did so on behalf of the corporation—not just the manufacturing division. And the corporation, through its wholesale divisions, competes with the independent wholesalers "on the same functional level"—*i. e.,* in selling Mc-

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facturer's retail stores, on the other. Although its rationale is not altogether clear, the Commission appears to have adopted the following test (pp. 35,420–1):

"When negotiating the fair trade agreements with retailers was respondent acting *in its capacity as a manufacturer . . . or in its capacity as a retailer?* In other words, it is necessary to study the particular agreement, examine its *form, economic purpose, intent and effect* and then decide whether it is a vertical or horizontal . . . agreement." [Emphasis added.]

But when a manufacturer-retailer, "acting in its capacity as a manufacturer," makes a "fair trade" agreement with a competing retailer, it does not thereby stop being a retailer as well as a manufacturer. The competitive relationship exists regardless of what "capacity" the company is acting in at any given moment. Moreover, the criteria enunciated by the Commission—"form, economic purpose, intent and effect"—are precisely the criteria which this Court has held are *not* material in price-fixing cases. See, *e. g., United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 218, 222–223.

In holding the challenged agreements exempt, the Commission overruled its earlier decision to the contrary in *Eastman Kodak Co.*, CCH Trade Reg. Rep., par. 11,527. See also *Doubleday Doran Co.*, CCH Trade Reg. Ref., par. 11,515. New York state lower courts have likewise expressed conflicting views on the issue. Compare *General Electric Co.* v. *S. Klein on the Square, Inc.*, 121 N. Y. S. 2d 37, with *Eastman Kodak Co.* v. *Schwartz*, 133 N. Y. S. 2d 908.

Kesson brand products at wholesale to retailers.[27] Indeed, the manufacturing division itself competes "on the same functional level" with the independent wholesalers.[28] McKesson's relationship with the independent wholesalers, therefore, is not simply one of seller-buyer but also one of competitor *vis-a-vis* competitor. Unless the substance of the challenged agreements is to be subordinated to the form in which McKesson has cast them,[29] this competitive relationship precludes any exemption for the agreements under the Miller-Tydings and McGuire Acts.

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[27] Moreover, 73 of the 94 challenged agreements relate to sales of McKesson brand products by McKessen wholesale divisions located in the same localities as the purchasing independent wholesalers. As to these 73 agreements, the manufacturing division is not even the seller.

[28] As pointed out above, many of the independent wholesalers—including the five not otherwise in competition with McKesson—serve trading areas in which there are located large retailers who make direct purchases from the manufacturing division. These retailers commonly make purchases of McKesson brand products from *both* the manufacturing division and the local wholesalers (either McKesson wholesale divisions or independent wholesalers).

[29] "[A]ll the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. . . . [T]he generic designation of the first and second sections of the [Sherman Act], when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed." *United States* v. *American Tobacco Co.*, 221 U. S. 106, 180–181. See also *United States* v. *Masonite Corp.*, 316 U. S. 265, 280.

D. THE LEGISLATIVE HISTORY OF THE MILLER-TYDINGS AND MC GUIRE ACTS AFFORDS NO BASIS FOR A DIFFERENT CONSTRUCTION

The court below, as already noted, flatly rejected the legislative history of the Miller-Tydings and McGuire Acts as an index of Congressional "intent" on the question presented in this case. Judge Murphy concluded (R. 20):

> Examining the legislative history of the Miller-Tydings and McGuire Acts only confirms the observation of Mr. Justice Jackson with respect to the former statute: "I can think of no better example of legislative history that is unedifying and unilluminating than that of the Act before us." [Concurring in *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384, 397.]

In the *Schwegmann* opinion, Mr. Justice Jackson added:

> Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared * * * to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions. * * * It is the business of Congress to sum up its own debates in its legislation. * * *

> Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. * * * To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country. [341 U. S. 384, 395–397.]

Both Mr. Justice Jackson in *Schwegmann* and Judge Murphy in the opinion below expressed their assent to Mr. Justice Holmes' admonition: "We do not inquire what the legislature meant; we ask only what the statute means." Holmes, *Collected Legal Papers*, p. 207.

Whatever may be the merit of this admonition as a general matter (compare *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479), the legislative history of the Miller-Tydings and McGuire Acts provides no justification for the construction urged here by McKesson. The committee reports, as Judge Murphy noted (R. 21), "are replete with condemnation of 'horizontal' and approbation of 'vertical' fair trade agreements," but do not "come to grips with the instant problem, squarely and unequivocally." The same is true of statements by individual legislators who either introduced the bills or served on committees that had considered the provision in question. With respect to statements by other individual legislators, at best they are inconclusive. Compare *Brown* v. *Board of Education*, 347 U. S. 483, 489. Under these circumstances, the cus-

tomary usage of the language to be construed becomes of decisive importance.[30] See *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 493–494.

1. *The Miller-Tydings Act*

The Miller-Tydings bill originated in the 74th Congress. The bill (S. 3822) was reported out by the Senate Judiciary Committee (S. Rep. 2053, 74th Cong., 2d sess.) and was passed by the Senate (80 Cong. Rec. 8433) but was not reported out of committee in the House. In the 75th Congress, the bill (S. 100, 81 Cong. Rec. 66; H. R. 1611, 81 Cong. Rec. 34) was reported out by the judiciary committee of each house (S. Rep. 257 and H. Rep. 382, 75th Cong., 1st sess.) but was not debated or acted upon. Finally, the bill was attached by the Senate Committee on the District of Columbia (S. Rep. 879, 75th Cong., 1st sess.) as a rider to a District of Columbia revenue bill (H. R. 7472). Not until the bill

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[30] In this respect, this is an even more appropriate case than *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, for construing a statute according to the customary usage of the language. In *Schwegmann*, the Court adopted such a construction of the Miller-Tydings Act despite some contrary evidence in committee reports and despite a contrary interpretation by some federal officials at the time the Miller-Tydings Act was passed. See dissenting opinion, 341 U. S. at 401–402. In the instant case, none of these obstacles is present to block a construction based on the ordinary meaning of the provisos. Here, in short, there is no reason to think that Congress was using "a private code" when it enacted the provisos into law. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 543–544.

reached the Senate floor was the proviso—denying an exemption to agreements (among others) "between wholesalers" and "between persons, firms, or corporations in competition with each other"—added to the bill. In this form it was debated and passed by the Senate (81 Cong. Rec. 7486–7487, 7488–7497) and approved by the House on recommendation of the House conferees (81 Cong. Rec. 8137–8143).

Senate Report 2053 in the 74th Congress, recommending enactment of S. 3822, read in part as follows (p. 2):

> The State acts are in no sense general price-fixing acts. They merely authorize a manufacturer or producer to enter into contracts for the maintenance of his price, but they do not compel him to do so. In other words, they are merely permissive. *They do not authorize horizontal contracts,* that is to say, contracts or agreements between manufacturers, between producers, or between wholesalers, or between retailers as to the sale or resale price of any commodity. [Emphasis added.]

This language was quoted in Senate Reports 257 and 879 in the 75th Congress, recommending enactment of S. 100 and H. R. 7472, respectively. No other reference to the effect of the proposed exemption on "horizontal" agreements appears in the three Senate reports. And in the single House report, No. 382 in the 75th

Congress, no reference whatever is made to the subject. The absence of any significant discussion in the four reports is hardly surprising in view of the fact that the proviso was not added until after their submission.

The proviso was first proposed by Senator Tydings on July 6, 1937, the same day on which the Senate Committee on the District of Columbia had submitted its report on H. R. 7472. In part, the language of the proviso was apparently taken from the state acts, which generally exclude "any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices."[31] The federal legislation, however, excludes not only agreements "between producers or between wholesalers * * * or between retailers" as the state acts do, but also excludes agreements "between manufacturers * * * or between brokers or between factors * * * or between persons, firms, or corporations in competition with each other." These latter categories appear in none of the state acts.

At the outset of the debate on the rider, Senator Tydings stated (81 Cong. Rec. 7487) that the amendment was offered "in order that there may be no misunderstanding and *that the element of competition may be kept forward*

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[31] Report of the Federal Trade Commission on *Resale Price Maintenance* (1945), pp. 80–81.

throughout the process projected in this measure * * *." [Emphasis added.][32] Later the following colloquy occurred (81 Cong. Rec. 7496):

> Mr. SCHWELLENBACH. Will the Senator explain just what the amendment does as compared to what is printed in the bill?
>
> Mr. TYDINGS. Originally, as the Senator from Washington will recall, there was a message from the administration in opposition of this measure. I may say that I have been in consultation with the Attorney General's office, and the amendment I have offered was suggested by me and accepted by the Attorney General as curing the objections of the administration * * *.

At the conclusion of the debate,[33] the amendment to the rider and then the rider itself were passed by the Senate. 81 Cong. Rec. 7497.

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[32] In a similar vein Senator Tydings emphasized (81 Cong. Rec. 7495) that "There is not a line in the [rider] which would permit manufacturers to combine with other manufacturers, wholesalers with other wholesalers, or retailers with other retailers."

[33] Perhaps the most apt characterization of the Senate debate was Senator Vandenberg's comment (81 Cong. Rec. 7492): "Regardless of the merits of this [rider], it is perfectly obvious that not 5 percent of the membership of the Senate will know anything whatever about the [rider] when the Senate votes upon it. It is perfectly obvious that the Senate has reached the point of exhaustion in respect of the consideration of legislation; and if the Senate has any prudent consideration whatever for the country, instead of trying to do some of these intricate things it will quit and go home."

The House debate on the bill is scarcely more conclusive. Because of House objections to the rider, the bill was referred to a conference committee composed of members of both the House and the Senate. The committee recommended that the House recede from its objections. 81 Cong. Rec. 8137. In explaining to the House why the House conferees had agreed not to oppose the rider, Representative Dirksen, a member of the committee, had only this to say of the proviso (81 Cong. Rec. 8138): "Then came the District revenue bill and this Tydings-Miller bill was attached as a rider. It was slightly modified from its original text by a proviso which I am informed was acceptable to the Attorney General and acceptable to the authors." During the discussion that followed, 81 Cong. Rec. 8139–8143, there were no other comments on the matter by any other member of the conference committee or by Representative Miller, the author of H. R. 1611. The conference committee's report was thereupon approved. 81 Cong. Rec. 8143.

Representative McLaughlin, it is true, briefly alluded to the effect of the proviso added in the Senate.[34] He declared, in the course of a rather

[34] 81 Cong. Rec. 8141:

"* * * The act, as amended in the Senate, and as now before the House in the conference report, specifically provides that the act shall not make lawful any contract or agreement providing for establishment or maintenance of minimum resale prices on any commodity covered by the act, between manufacturers, or between producers, or between wholesalers,

lengthy statement, the obvious truth that price-fixing agreements between manufacturers (or sellers) of *different* trade-marked articles would continue to be illegal because of the proviso. Relying on this statement, McKesson urged below (albeit unsuccessfully) that the provisos apply exclusively to such agreements.[25] But any such inference from the McLaughlin statement is at most a very dubious one. Representative McLaughlin may well have intended his explanation to be merely illustrative of the scope of the proviso, not necessarily all-inclusive; we note that he himself used the qualifying language "as an example."

And, in any event, although Representative McLaughlin was a member of the House Judiciary Committee which had considered H. R.

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or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. *As an example, the act would not allow two manufacturers of similar trade-marked articles, as, for instance, articles of food or drugs or clothing or soap or fountain pens, or any other competing articles of similar kind, to agree between themselves as to the price at which their respective articles shall be sold.* The act does not alter the provisions nor the effect of the Sherman Act as to such contracts. In other words, it simply authorizes contracts, permitted by the States, between the seller and buyer of one article—contracts known as vertical contracts. It does not permit contracts between seller and seller of different articles—contracts known as horizontal contracts." (Emphasis added.)

[25] See footnote 24, *supra.* This construction was also rejected by the Federal Trade Commission in the *Eastman Kodak* decision, notwithstanding full consideration of the McLaughlin statement.

1611, the proviso was never a part of that bill. As already stated, it was proposed on the Senate floor long after the House Judiciary Committee's consideration of H. R. 1611. On this matter, therefore, Representative McLaughlin spoke only as an individual legislator and not as a draftsman or sponsor.[36] "The peril of resorting to individual constructions of legislators," as the court below pointed out (R. 21), "is not merely that the mandate of the statute would cease to be embodied in its language and become unavailable as warning to the nation at large. It is also that such views may be no more than individual ones."[37]

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[36] The inconclusive nature of the McLaughlin statement was expressly recognized in the Court's opinion in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384. Representative McLaughlin is the "one" Congressman in the debate [who] said that the nonsigner provision of state laws was validated by the federal law." *Id.* at 393. But the Court found that, under the circumstances, "we do not take these remarks at face value." *Ibid.* The McLaughlin statement is entitled to even less weight in the instant case since, on the question presented here, his remarks are considerably more ambiguous.

[37] See also, *e. g.*, *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318: "Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other." The latter half of this criticism of undue reliance on individual statements may be applicable here. McKesson relies on the McLaughlin statement as evidence that Congress restricted the provisos exclusively to agreements covering two or more competing products. McKesson also relies on a statement by Senator Humphrey during the debate on the McGuire Act, 98 Cong. Rec. 8870. Yet the Humphrey statement makes clear that the provisos apply to agreements between wholesalers on a *single* product.

2. *The McGuire Act*

The McGuire Act, like the Miller-Tydings Act, denied an exempt status to resale price-fixing agreements "between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." Because of the identical language used in the two provisos, and in the absence of any evidence to the contrary, it would seem apparent that the McGuire Act is to that extent only a reenactment of the Miller-Tydings Act. The legislative history of the McGuire Act proviso, therefore, is probably entitled to even less weight than that of the Miller-Tydings Act proviso.

The McGuire bill (H. R. 5767) was introduced in the 82d Congress. Undoubtedly its main purpose was to legalize "non-signer" clauses in state "fair trade" acts and thus modify the rule of the *Schwegmann* decision. See remarks of Representative McGuire on offering the bill, 97 Cong. Rec. 13404–13405. Concerning the proviso, in the same form then as at present, he only said: "The bill specifically forbids agreements between manufacturers, or between wholesalers, or between retailers, or between 'persons, firms or corporations in competition with each other.'" The bill was referred to the House Interstate and Foreign Commerce Committee, which recommended enactment.

With respect to the proviso, the Committee's report (H. Rep. 1437, 82d Cong., 2d sess., p. 6) states: "This paragraph contains substantially the same provisions as those inserted in the Sherman Act by the second proviso of the Miller-Tydings Act." [38]

During the same session, a somewhat similar bill (H. R. 6925) was introduced by Representative Keogh and was referred to the House Committee on the Judiciary.[39] This bill, like the McGuire bill, contained a proviso substantially identical to the proviso in the Miller-Tydings Act. In the Committee's report recommending enactment (H. Rep. 1516, 82d Cong., 2d sess., p. 18), only this was said of the proviso: "Subsection (f) specifically prevents contracts and agreements *between competitors*, so-called 'hori-

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[38] With respect to paragraph (2), the report (pp. 5–6) states that the paragraph "contains substantially the same provisions" as the first part of the Miller-Tydings Act. The first exception added a provision expressly covering an agreement which prescribed a stipulated price. The second exception added a provision expressly covering an agreement which requires a vendee to enter into another contract prescribing a resale price.

[39] The principal differences between the two bills were these: the Keogh bill authorized only the fixing of minimum resale prices, while the McGuire bill authorized the fixing of stipulated as well as minimum resale prices; and the Keogh bill declared price-cutting in violation of state "fair trade" acts to be an act of unfair competition under federal law, while the McGuire bill left the matter to the States for enforcement.

zontal' agreements between producers or distributors on the same level of commerce." (Emphasis added.) The bill was brought up on the House floor at the same time as the McGuire bill.

The House debate on the two bills (98 Cong. Rec. 4896–4926, 4933–4956) throws little light on the question presented here. There were, of course, general statements to the effect that the bills would not permit "horizontal" price-fixing. See, *e. g.*, remarks of Representative Madden (*id.* at 4896) and Representative Dolliver (*id.* at 4902). According to Representative Patman, the bills would not permit "horizontal price fixing, that is, *any getting together of competitors* who agree not to compete on price." [Emphasis added.][40] And two Congressmen stated that collusion between competing sellers would not be exempt under the bills if enacted. See remarks of Representative Hill (98 Cong. Rec. 4907) and Representative McKinnon (98 Cong. Rec. 4955). After the debate, the McGuire bill was passed by the House and sent to the Senate. (98 Cong. Rec. 4956.)

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[40] Mr. Patman also stated (98 Cong. Rec. 4951): "*Horizontal price fixing is essentially an agreement among those who are on the same level in the distributive process*, be they manufacturers or distributors, *not to compete.* Vertical resale price maintenance takes place between a manufacturer and his distributors, who are not on the same level in the distributive process and thus, of course, *are not competitors.*" [Emphasis added.]

In the Senate, the bill was referred to the Senate Committee on Interstate and Foreign Commerce. Hearings on the bill were held on June 2, 1952, six days after the well-publicized filing of the Government's complaint in the instant case.[41] The Committee's report (S. Rep. 1741, 82d Cong., 2d sess.) reported the bill back to the Senate without, however, expressing approval or disapproval and without any committee comments.

During the ensuing debate on the Senate floor (98 Cong. Rec. 8716-8748, 8819-8858, 8865-8873, 8881-8890, 8891-8892), the only reference to the proviso appeared in remarks by Senator Humphrey in a brief colloquy with Senator Spark-

[41] Hearings before Senate Committee on Interstate and Foreign Commerce on H. R. 5767, 82d Cong., 2d Session. The first witness was the Assistant Attorney General in charge of the Antitrust Division. In the course of his statement, he made reference to the *McKesson* case and sketched the nature of the charges in the Government's complaint. *Id.* at 17.

Other witnesses included the President of the American Fair Trade Council, a principal proponent of the legislation. In his statement he said (*id.* at 137):

"Horizontal price fixing is the fixing of prices by parties normally in competition with each other * * *.

"* * * Under vertical price maintenance minimum prices are established by contract between parties who do not compete with each other * * *."

See also the similar statement of the Legal Counsel for the National Association of Retail Druggists (*id.* at 225).

man.[42] These remarks took place on July 2, 1952, more than a month after the complaint in the

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[42] 98 Cong. Rec. 8870:

"* * * If, for example, when a producer, who sells to distributors, wholesalers, retailers, and consumers, makes a resale price-maintenance agreement relative to a commodity made by him and bearing a trade-mark or brand, with a distributor, wholesaler, or retailer who resells such commodity at either the wholesale, or retail level, there exists a vertical resale price-maintenance contract which would be lawful under the bill if the requirements of paragraph (2) are met.

"On the other hand, *if one wholesaler enters into a resale price-maintenance agreement with another wholesaler prescribing the price at which they both sell a trade-marked or branded commodity which they both buy from the producer, that agreement would be horizontal and would not be made lawful.*

"In other words, wholesalers getting together on a price are acting illegally. For a manufacturer to get together with other manufacturers to maintain prices is illegal, but for a manufacturer to say that a certain product will sell at a certain price from the manufacturer down to the retailer is legal under the limitations prescribed in paragraph (2) of section 5 (a) of the Federal Trade Commission Act.

"In general, the test of whether a resale price-maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price-maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved. It is important to keep this distinction in mind, because *many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.*

"*Under the bill, such firms, may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers.* While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and

instant case had been filed. Senator Humphrey, it should be noted, was not a member of any committee that had considered the bill. After the debate, the bill was passed by the Senate and sent to the President for his signature. 98 Cong. Rec. 8892.

McKesson places heavy reliance on the Humphrey statement (Motion to Affirm, p. 6), even though the statement flatly rejects McKesson's argument that the provisos apply only to agreements covering *different* trade-marked articles. Notwithstanding this variance between McKesson's construction of the proviso and the Humphrey statement, McKesson contends that the statement is controlling on the specific question presented here. This contention, we believe, cannot be accepted.[43] As already noted, Senator Humphrey was not a member of any committee which had considered the bill; thus he spoke only in an individual capacity and his views, as the court below pointed out (R. 21) in refusing to

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retailers, when in making such contracts they act as producers of a trade-marked or branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers." [Emphasis added.]

[43] In addition to the other reasons set forth above, it is not entirely clear from the Humphrey statement that he meant his remarks to apply even in a situation where the manufacturer-wholesaler and the independent wholesalers are engaged in competition with each other. His discussion appears to relate solely to the "between wholesalers" phrase to the exclusion of the "corporations in competition" phrase.

follow the Humphrey statement, "may be no more than individual ones." While it is undoubtedly true that Senator Humphrey was one of the most vigorous proponents of the McGuire Act in the Senate, there may be, and often is, a disparity between the hopes of the supporters of legislation and the statute finally enacted. See *United States* v. *New York Central R. Co.,* 263 U. S. 603, 610.

Moreover, Senator Humphrey was speaking with respect to the meaning of a bill which had originated in the House rather than the Senate and had already been passed by the House. When the House enacted the McGuire bill, it did not also thereby place its stamp of approval on any interpretation that might subsequently be put on the bill by a single Senator. There is no evidence indicating that anyone in the House (or, for that matter, anyone in the Senate, except possibly Senator Sparkman) concurred in Senator Humphrey's views on the question presented here. Indeed, numerous statements condemning "horizontal" price-fixing between competitors (see, *e. g.,* Representative Patman's statement 98 Cong. Rec. 4951, *supra*) appear to run in the contrary direction.

In short, the legislative history fails to show that either Congress as a whole or any of the appropriate committees had formulated any "legislative intent" on the specific question here presented. What it does show, however, is Con-

gressional insistence that the legislation should not be used to sanction any "horizontal" price-fixing agreements between competitors. It certainly affords no support for McKesson's attempt to broaden the exemption beyond the ordinary meaning of the language to immunize from the Sherman Act "fair trade" agreements between a manufacturer-wholesaler and independent wholesalers with whom it competes.

E. CONTRARY TO MC KESSON'S ASSERTION, THE CONSTRUCTION URGED HERE WOULD NOT DESTROY THE "FAIR TRADE" EXEMPTION

McKesson urges, however, that a construction of the provisos based on the common usage of the language "would result in the grant of the power to fair trade being substantially swallowed up by the exceptions, and would [thus] completely frustrate the intent of Congress." (Motion to Affirm, p. 7.) Such fears, to say the least, are considerably exaggerated.

At the outset, it should be noted that the only price-fixing agreements in controversy are those between McKesson and the independent wholesalers. McKesson is in error in imputing to the Government the "bald contention that a manufacturer of brand named merchandise necessarily loses his right to statutory fair trade protection if he himself participates in any degree as a wholesaler in the distribution of his own products * * *." (Motion to Affirm, p. 3.) The

Government makes no such contention. Except in those states where "fair trade" is not permitted, drug retailers are bound, either by contract or nonsigner provisions, to sell McKesson products only at the prices fixed by McKesson. Such use of "fair trade" is not challenged here.[44] These retailers, unlike the independent wholesalers, are not engaged in competition with McKesson. And cancellation of McKesson's agreements with the independent wholesalers will not relieve these retailers of the obligation under state "fair trade" laws to abide by McKesson's retail price schedule.

Nor does McKesson offer any convincing evidence in support of its contention that "[t]o hold with the Government * * * would be to exclude from the statutes all but a small segment of the producers of competitive brand named merchandise and to limit fair trade to the unusual case." (Motion to Affirm, p. 3.) McKesson merely points to statistics showing that "22% of all manufactured goods is wholesaled through outlets owned or operated by the manufacturers as compared with only 25% through independent wholesalers." (Motion to Affirm, p. 7.) But

[44] One qualification should be noted. Conceivably the district court, for the purpose of dissipating the effects of the charged antitrust violation, might find it necessary to order a temporary suspension of McKesson's whole price-fixing program.

these statistics are completely meaningless on the question presented here. First of all, these statistics relate to manufactured goods generally and not just "fair trade" products. Second, these statistics do not reveal the percentage of manufacturers that (like McKesson) sell *both* through their own wholesale outlets and through independent wholesalers. Third, these statistics give no indication of the percentage of such manufacturers whose own wholesale outlets are *in competition* with the independent wholesalers. Only manufacturers of this type will be affected by the decision in the instant case, and even then only to the extent that they enter into "fair trade" agreements with the competing independent wholesalers. Unaffected will be all other "fair trade" agreements, as well as a manufacturer's right to relief against "non-signers."

Far from destroying "fair trade," the Government's construction of the provisos will only insure that "fair trade" is not used as a cover for price-fixing between competitors.

CONCLUSION

The judgment of the district court should be reversed and the cause remanded for entry of an appropriate decree.

Respectfully submitted.

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